Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

ELMER F. WILLIAMS, II,

Petitioner,

v.

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND; DONNY R. MYERS; TOMMY R. SHELTON; GEORGE LOWDERMILK; MAXIE R. PATTERSON; D. GRADY PERDUE; JERRY A. BESSELMAN; PHILLIP J. WEDGEWORTH; ANDREA J. GERBER; WINSTON JOHNSON; J. WILEY GEORGE; STRASBURGER & PRICE, L.L.P.; JONATHAN B. CLAYTON,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Local government decisionmakers considered specific pending state statutory claims for pension benefits including petitioner's, they then made their interpretation of the statute "in the knowledge of the pending claims"[1] and applied their interpretation to deny petitioner's pending claim. Relying on the decisionmakers' claimed motivation, the Fifth Circuit ruled the decisionmakers were acting legislatively. Therefore, petitioner had no due process rights including the right to have his claim decided by fair and impartial decisionmakers.

1. Is the interpretation and application of a statute to decide already filed claims a legislative activity?

Trustees for a government pension fund interpreted and applied a state pension statute to prefer the relocation to Houston of firefighters from particular Texas cities over equally eligible firefighters from other Texas cities and other states. Petitioner was denied the right to buy a particular pension benefit solely because he had worked for a particular city – an irrelevant fact. The Fifth Circuit ruled the trustees could discriminate against petitioner's class in order to save the trustees' pension fund money.

2. Does an official's interest in saving money justify discrimination against equally eligible citizens based on an irrelevant fact?

3. Do United States citizens have a fundamental right to travel intrastate that requires heightened scrutiny of discrimination based on the location of a citizen's prior employment?

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[1] App., *infra*, 5a.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unreported. The opinion (App., *infra*, 9a-20a) and orders (App., *infra*, 7a-8a, 21a-30a) of the district court are unreported.

JURISDICTION

The court of appeals' judgment was entered on July 19, 2000. A timely petition for rehearing was denied on August 17, 2000. (App., *infra*, 31a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides in relevant part: "No State shall . . . deprive any person of . . . property, without due process of law." U.S. Const. amend. XIV, sec. 1, cl. 3.

The Equal Protection Clause of the Fourteenth Amendment provides in relevant part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, sec. 1, cl. 4.

The Privileges and Immunities Clause of the Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." U.S. Const. amend. XIV, sec. 1, cl. 2.

The relevant provision of the Texas statute, Tex. Rev. Civ. Stat. article 6243e.2 § 30 (Vernon Supp. 1996), is reproduced at App., *infra*, 33a-34a.

STATEMENT

A. Factual Background

Petitioner Elmer Williams is a Houston firefighter and a member of the Houston Fire Department's (HFD's) pension trust fund, the Houston Firefighters' Relief and Retirement Fund (Fund). (App., *infra*, 2a). The Fund, its trustees and attorneys are respondents.

The Fund is created by state statute[2] and serves Houston firefighters only. (App., *infra*, 2a). It is the only Fund that exists under the statute, and is completely separate from any other pension fund. (App., *infra*, 2a; *see* art. 6243e.2). The Fund is financed solely by contributions from its members, the City of Houston and the Fund's return on investment. (art. 6243e.2 §§ 9 & 10; Doc. 50, p. 125[3]). When this dispute arose, the Fund was administered by its Board of nine trustees. The Board of Trustees was comprised of the City of Houston's Mayor (or his representative), the City of Houston's Treasurer, five active firefighters employed by the City of Houston, and two local citizens. (art. 6243e.2 § 2(a)(2)). Under the statute, the trustees had adjudicatory powers and rulemaking powers. (art. 6243e.2 § 2(j)).

Williams had worked as a firefighter for two other Texas cities before he joined the Houston Fire Department and the Fund in 1990. (App., *infra*, 2a, 10a). In 1995, Williams and eighty-seven other Houston firefighters filed claims with the trustees for prior service credit.[4] (App., *infra*, 35a). Their

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[2]Tex. Rev. Civ. Stat. art. 6243e.2 (Vernon 1996).

[3]Record citations follow the abbreviations used in the court of appeals.

[4]Prior service credit is a statutorily provided benefit that allows

(continued...)

claims were based, in part, on a 1995 final state court decision awarding prior service credit to another Houston firefighter who had previously worked for the San Antonio, Texas Fire Department. (App., *infra*, 3a; Doc. 50, p. 11-16).

The trustees considered the firefighters' claims before they interpreted and applied the statute. (App., *infra*, 5a, 35a-38a). Sometime prior to June 13, 1996, the trustees considered the firefighters' applications for prior service credit. (App., *infra*, 5a, 35a-38a). In July 1996, the trustees interpreted the prior service credit statute, and changed the criteria for receiving prior service credit. (App., *infra*, 39a-41a). In January 1997, the trustees applied their July 1996 statutory interpretation to the claims that had been pending since 1995. (App., *infra*, 42-44a). Based solely on their new statutory interpretation, the trustees denied many claims including Williams's claim. (App., *infra*, 39a-44a).

The trustees are fiduciaries for the Fund. (App., *infra*, 15a). Before the claims were filed, the trustees stated, under oath, their bias against the claims. (Doc. 50, pp. 64-81). The trustees considered the applications before interpreting the statute. (App., *infra*, 5a, 35a-38a). Approval of all eighty-eight claims would have cost the Fund about $3.7 million dollars. (Doc. 50, pp. 146-148). In July 1996, after the claims had been pending for nine months, the trustees interpreted the statute during a closed meeting. (Doc. 50, pp. 17, 19, 34-42, 43-45, 61). The trustees' meeting was closed to the public because they contemplated litigation against the claimants. (*Id.*). Instead of formulating policy, the trustees contended their statutory interpretation relied solely upon their technical reading of the statute's language and their assumptions about its history in

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[4](...continued)

Houston firefighters to receive credit in the Houston Firefighters' Relief and Retirement Fund for their prior time spent working for fire departments other than the Houston Fire Department. Tex. Rev. Civ. Stat. art. 6243e.2 § 30 (Vernon 1996).

an effort to determine the Texas legislature's intent. (Doc. 50, p. 121). The trustees' statutory interpretation was made for the purpose of restricting interstate and intrastate travel by firefighters in order to shrink the eligibility pool for prior service credit (Doc. 66, Patterson deposition transcript pp. 20-21, 31-34), and the district court found that was the effect of the trustees' new criteria. (App., *infra*, 17a). The trustees' new statutory interpretation was not published; it was not communicated to anyone other than those individuals who had pending claims. (Doc. 50, pp. 35-36, 44).

When the trustees approve a firefighter's claim for prior service credit, both the City of Houston and the firefighter receiving prior service credit must pay additional money into the Fund. (App., *infra*, 33a-34a). The amount of those additional payments by both the City of Houston and the approved firefighter are based solely on a statutorily prescribed formula that deems the approved firefighter to have been always employed by the Houston Fire Department. (App., *infra*, 33a-34a). The Fund does not receive money from any other source. (art. 6243e.2). Consequently, the Fund would receive the same amount of money for any approved firefighter regardless of where that firefighter previously worked.

Every fact about a Houston firefighters' previous employer including its type of pension fund is irrelevant to the prior service credit issue. Williams, however, was denied prior service credit solely because the cities for which he had previously worked did not have a certain kind of pension fund. Williams's claim was denied solely "because previous employment was with a fire department of a Texas city that does not have its own firemen's relief and retirement fund created under Article 6243e or its successors." (App., *infra*, 42a-44a).

B. Related State Court Proceedings

Williams appealed the trustees' decision to the Texas courts, but subject matter jurisdiction was declined until the years 2003 or 2010 because the statute did not provide him any right to appeal the trustees' decision until he was "eligible for retirement." (App., *infra*, 3a, 53a). The case was remanded and is now pending before a Texas intermediate appellate court. That case does not involve these constitutional issues. Its outcome will not affect the issues presented in this case.

C. Proceedings Below

Williams filed this lawsuit claiming respondents' statutory interpretation and application denied him due process and equal protection. Respondents moved for summary judgment, and Williams cross-moved for partial summary judgment on the due process and equal protection claims. The district court granted respondents' motion for summary judgment. (App., *infra*, 7a-8a).

Adopting the trustees' label, the district court said the trustees' statutory interpretations were "guidelines." (App., *infra*, 39a-41a, 14a). The court then held that the trustees' conduct was legislative since it was within the trustees' statutory authority to make guidelines, and those guidelines applied to a general class of persons. (App., *infra*, 14a). The district court also reasoned that the classifications created by the trustees' statutory interpretation protected fund assets while also "facilitat[ing] the relocation" to Houston of one class of firefighters over another class of firefighters that included Williams. (App., *infra*, 17a).

In an unpublished, per curiam opinion, a unanimous panel of the Fifth Circuit affirmed. (App., *infra*, 1a-6a). The court held, "In distinguishing the legislative from the judicial model, courts have examined whether the governmental body was *motivated* by deciding the best course for the group in

general, or adjudicating the rights of contending petitioners." (App., *infra*, 4a-5a)(emphasis added). Then, apparently based upon what the court assumed the trustees' motivation to have been, the court concluded, "the Board was exercising its statutory authority to promulgate guidelines . . ." *Id.* The court determined that the trustees' interpretation of the statute "while made in the knowledge of the pending claims" was still legislative. *Id.* The trustees' bias was therefore, not relevant. (App., *infra*, 5a).

The court dismissed Williams's equal protection claim by stating that "a desire on the part of the Board to save money" was a legitimate state interest. (App., *infra*, 5a-6a). The court did not articulate how discriminating against Williams based on where he used to work rationally furthered that state interest.

Williams's petition for rehearing was denied.

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals' Consideration of Motive to Decide that the Respondents Acted legislatively Conflicts With This Court's Decisions

The court of appeals' decision to regard a local decisionmaker's interpretation and application of a statute to decide pending claims as legislative action instead of judicial action, especially when the decisionmaker had already considered the factual bases of those pending claims, conflicts with this Court's decisions and guts due process.

Since the beginning of the Nation, interpretation and application of the laws has been regarded as a quintessential judicial function. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). The "'judicial power' requires

judges 'to determine the law' arising upon the facts of the case." *Anastasoff v. United States*, 223 F.3d 898, 901 (8th Cir. 2000)(quoting 3 Blackstone, Commentaries p. 25). "It is said that that which distinguishes a judicial from a legislative act is, that the one is a determination of what the existing law is in relation to some existing thing already done or happened, while the other is a predetermination of what the law shall be for the regulation of all future cases." *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 107 (1993). "The interpretation of the meaning of statutes, as applied to justiciable controversies, is *exclusively a judicial function.*" *United States v. American Trucking Assoc., Inc.*, 310 U.S. 534, 543 (1940)(emphasis added).[5]

The court of appeals' statement of the law directly conflicts with this Court's unanimous statement of the law. "Whether an act is legislative turns on the nature of the act, rather than on the *motive or intent* of the official performing it." *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998)(emphasis added) (voting for an ordinance is quintessentially legislative). The intent or motivation of the actor cannot be considered. *Id.* However, the court of appeals held, "In distinguishing the legislative from the judicial model, courts have examined whether the governmental body was *motivated* by deciding the best course for the group in general, or adjudicating the rights of contending petitioners." App., *infra*, 4a-5a (emphasis

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[5]Likewise, under Texas law, a firemen's pension board's interpretation of its statute is not legislative activity. *Firemen's Pension Commission for the State of Texas and Corpus Christi Firemen's Relief and Retirement Fund v. Jones*, 939 S.W.2d 730, 735 (Tex. App. -- Austin 1997, writ denied). Moreover, a Texas court of appeals, in an appeal between these same parties and based on the same denial of benefits, held the defendants' interpretation of the state statute (section 30) was "a purely legal question," which is "inherently a judicial determination." *Williams v. Houston Firemen's Relief and Retirement Fund*, 1999 Tex. App. Lexis 893, *15-*16 (Houston [1st Dist.] February 11, 1999). (App., *infra*, 59a).

added). Impermissibly, the court of appeals expressly based its decision on the trustees' claimed motivation.[6]

Moreover, substantively, there was nothing legislative about the trustees' interpretation and application of the statute. Instead of formulating policy, the trustees contended their statutory interpretation relied solely upon their technical reading of the statute's language and their assumptions about its history in an effort to determine the Texas legislature's intent. (Doc. 50, p. 121). Before the claims were filed, the trustees stated, under oath, their bias against such claims. (Doc. 50, pp. 64-81). Williams's claim was based upon completed facts, a state statute, and a recent state court appellate decision in a similar case. The trustees considered the factual bases of the pending claims before interpreting the statute. (App., *infra*, 5a, 35a-38a). After the claims had been pending for nine months, the trustees interpreted the statute during a closed meeting. (Doc. 50, pp. 17, 19, 34-42, 44, 61). That meeting was closed to the public because the trustees contemplated litigation against the claimants. *Id.* Their new interpretation was not published; it was not communicated to anyone other than those individuals who had pending claims. (Doc. 50, 35-36, 44). Consequently, respondents' interpretation and application of the statute was not policymaking to govern future conduct – it was clearly judicial action.

Nonetheless, the court of appeals decided the trustees' interpretation and application of the statute was legislative action instead of judicial action. (App., *infra*, 5a). It did not even matter to the court that the trustees had considered the factual bases of those pending claims before they interpreted the statute. (App., *infra*, 5a, 35a-38a). The court of appeals concluded procedural due process did not apply. (App., *infra*,

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[6]It was also impermissible for the lower courts to resolve a fact issue such as motivation or intent against Williams on summary judgment.

5a). Therefore, the trustees' bias did not matter. (App., *infra*, 5a). The trustees could lawfully disregard precedent from a recent state court decision in a similar case. (App., *infra*, 6a, n. 9). They could interpret the statute for the very purpose of denying Williams's claim in order to save their trust fund money. (App., *infra*, 5a-6a).

The court of appeals' holding that such conduct is not judicial action is contrary to the long-settled decisions of this Court and common law tradition. Although not published, the court of appeals' decision stands as precedent for all cases to come. *Anastasoff*, 223 F.3d at 904 (unpublished opinions have precedential effect).

The court of appeals' decision guts procedural due process. Our Constitution's procedural due process guarantee of a fair and impartial decisionmaker is the keystone in our Nation's heritage of justice. From one end of the Nation to the other, there are countless thousands of local decisionmakers who, like the respondents, wield adjudicatory power and rulemaking power. Directly contrary to the law laid down by this unanimous Court in *Bogan*, 523 U.S. at 54-55, the court of appeals expressly based its decision on the trustees' claimed motivation. The court of appeals' decision allows pending statutory claims to be decided by biased local decisionmakers if they merely label their decisions "rulemaking," "guidelines," or otherwise conveniently claim to have been wearing their legislative hat.[7] Unless this Court is willing to say our Constitution's guarantee of procedural due process means something more than that, then our heritage of justice under law has become but "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a

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[7] "If judges had the legislative power to 'depart from' established legal principles, 'the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions'" *Anastasoff*, 223 F.3d at 904 (quoting 1 Blackstone, Commentaries p. 259).

pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941)(Jackson, J. concurring).

2. In Conflict With This Court's Decisions, The Court of Appeals Decided Officials Could Discriminate Between Equally Eligible Claimants for the Purpose of Saving Money

Solely because he had worked for a particular city, Williams was denied the right to buy a pension benefit other Houston firefighters who had previously worked for favored cities were allowed to buy. (App., *infra*, 42a-44a). The court of appeals concluded the pension trustees could discriminate between equally eligible classes of claimants for the purpose of saving their pension fund money. (App., *infra*, 5a-6a). However, an official's interest in saving money cannot justify discrimination against equally eligible citizens based solely on irrelevant facts. *Saenz v. Roe*, 526 U.S. 489, 506-507 (1999). The court of appeals' decision conflicts with this Court's decisions. For any type of government furnished benefit, the court of appeals' decision lets local officials discriminate against equally eligible United States citizens on the irrelevant basis of where that citizen used to live or work.

No fact about Williams's previous employer including the type of pension plan it had could affect the financial position of the Houston Firefighters' Relief and Retirement Fund. When a Houston firefighter buys prior service credit, the City of Houston and the purchasing firefighter must make statutorily prescribed monetary contributions to the Fund. (App., *infra*, 33a-34a). The Fund does not receive money from any other source. (art. 6243e.2). All firefighters buying prior service credit are statutorily deemed to have always been employed by HFD. (App., *infra*, 33a-34a). The Fund, therefore, receives the same amount of money for each firefighter buying the same amount of prior service credit. Therefore, no fact about a Houston firefighter's previous employer or its pension plan could rationally serve as the basis

for distinguishing between which Houston firefighters were allowed to buy prior service credit and which were not allowed to buy that same benefit.

The court of appeals' decision validates irrational discrimination by local officials. To paraphrase this Court in *Saenz*:

> the [Constitution] does not tolerate a hierarchy [of classes] of similarly situated citizens based on the location of their prior [employment]. . . . In short, *the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens.*

Saenz, 526 U.S. at 506-507 (emphasis added). The court of appeals did not articulate how discriminating against Williams based on where he used to work rationally furthered the trustees' interest in saving money. If local officials can deny benefits to equally eligible citizens based on irrelevant facts simply to save the government money, then this Court's rational basis jurisprudence has become meaningless.

3. Contrary to A Recent Decision by This Court As Well As Decisions From The Second And Third Circuits, The Court of Appeals Refused to Recognize Intrastate Travel As A Fundamental Right

The purpose and effect of the respondents' discriminatory statutory interpretation was to penalize the interstate and intrastate travel of persons including petitioner. (Doc. 66, Patterson deposition transcript pp. 20 -21, 31-34, App., *infra*, 17a). The court of appeals, however, decided respondents' discriminatory conduct should be subjected to rational basis review only. (App., *infra*, 5a). The court of appeals' decision conflicts with decisions by the Second and Third Circuits as well as this Court's decision in *Saenz v. Roe*,

526 U.S. 489 (1999)(United States citizen's right to travel is a fundamental right subject to strict scrutiny review.).

The Circuit Courts are split over whether intrastate travel is a fundamental right. Twenty-six years ago, this Court declined to specifically hold that intrastate travel was a fundamental right. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255-256 (1974). The next year, the Fifth Circuit, relying on *Maricopa County*, decided intrastate travel was not a fundamental right. *Wright v. City of Jackson*, 506 F.2d 900, 902-903 (5th Cir. 1975); *see also Wardwell v. Board of Educ. of Cincinnati*, 529 F.2d 625, 627-28 (6th Cir. 1976) (rejecting a fundamental right to intrastate as opposed to interstate travel). More recently, both the Second and Third Circuits decided intrastate travel is a fundamental right. *Lutz v. City of York*, 899 F.2d 255 (3d Cir. 1990); *Spencer v. Casavilla*, 903 F.2d 171, 174-175 (2d Cir. 1990); *see also King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648-649 (2d Cir. 1971). *See also Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999)(*en banc*)(a fractured decision acknowledging the circuits are split over whether intrastate travel is a fundamental right).

While Williams's case was pending before the Fifth Circuit, this Court decided *Saenz v. Roe*, 526 U.S. 489 (1999), which for the first time identified the constitutional source of the fundamental right to travel. *Id.* at 502-503. The fundamental right to travel includes the right to be treated like other citizens of a state. *Id.* at 500. It does not tolerate discrimination based on the location of one's prior residence. *Id.* at 506-507. It is based on one's United States citizenship. *Id.* at 502-503. It resides in the Fourteenth Amendment's Privileges and Immunities Clause. *Id.*

The Second Circuit reasoned that, "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *King*, 442 F.2d at 648-649.

In *Lutz*, 899 F.2d 255, the Third Circuit agreed with *King*, and it considered at length the constitutional source for the right to travel intrastate. The *Lutz* Court reasoned that if the Fourteenth Amendment's Privileges and Immunities Clause were a source for rights of national citizenship, then clearly intrastate travel was a fundamental right. *Lutz*, 899 F.2d at 264. Similarly, the *Lutz* Court reasoned that only if the right to travel resided solely in the Privileges and Immunities Clause of Article IV, then intrastate travel would not be a fundamental right. *Lutz*, 899 F.2d at 262-263. Although the *Lutz* Court decided the right to intrastate travel stemmed from the Due Process Clause, it rejected the Fourteenth Amendment's Privileges and Immunities Clause as a source merely because that clause had remained essentially dormant for so long. *Lutz*, 899 F.2d at 264. This Court resolved that issue in *Saenz* by identifying the Fourteenth Amendment's Privileges and Immunities Clause as the source for the right to travel.

Because the right to travel stems from one's federal citizenship and one's federal citizenship remains the same regardless of where one resides within any state, it follows that intrastate travel is a fundamental right. After *Saenz*, it should have been clear that a United States citizen's fundamental right "to travel throughout the length and breadth of our land,"[8] includes the right to travel throughout the length and breadth of any state within our land. That right includes the right to not be discriminated against based upon the location of one's prior residence. *Saenz*, 526 U.S. at 506-507.

The Fifth Circuit's decision in this case conflicts with the Second and Third Circuits as well as this Court's decision in *Saenz*. The conflict is attributable to the *Maricopa County* Court's decision to not settle this issue twenty-six years ago.

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[8] *Saenz*, 526 U.S. at 499 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969)).

The Fifth Circuit's decision in this case shows that despite *Saenz*, the conflict will continue. This Court alone can end the long running conflict on this fundamental issue of federal law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 2000

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21080

ELMER F. WILLIAMS, II,

Plaintiff-Appellant,

v.

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND; DONNY R. MYERS; TOMMY R. SHELTON; GEORGE LOWDERMILK; MAXIE R. PATTERSON; D. GRADY PERDUE; JERRY A. BESSELMAN; PHILLIP J. WEDGEWORTH; ANDREA J. GERBER; WINSTON JOHNSON; J. WILEY GEORGE; STRASBURGER & PRICE, L.L.P.; JONATHAN B. CLAYTON,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas
H-98-CV-63

[Filed July 19, 2000]

Before REYNALDO G. GARZA, JOLLY, AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

Elmer R. Williams II appeals the district court's grant of summary judgment to defendants regarding Williams' 28 U.S.C. § 1983 claims that his pension fund, the Houston Firefighters Relief and Retirement Fund, denied him due process and equal protection by rejecting his request for certain pension benefits. Finding that the Fund's actions were based on a legislative act, we reject Williams's constitutional claims. We also find no error in the district court's denial of relief under Federal Rule of Civil Procedure 60(b) based on new evidence.

I.

Williams is a Houston firefighter and participant in the Fund. The Fund is created by state statute and serves Houston firefighters only.[1] Both participating Fund members and the City of Houston contribute to the fund. The Fund is administered by a Board of Trustees comprised of two City officials, former firemen, and local citizens. It is given rulemaking authority under the statute.

Williams transferred from the Hollywood Park Fire Department to the Houston Fire Department and in

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

[1]Tex. Rev. Civ. Stat. art. 6243e.2 (1996). This statute has since been amended, but the pre-1997 statute is the version applicable in Williams's case.

1995 sought prior service credit from the Houston Fund. Williams and other firefighters based their claim, in part, on successful litigation brought by another firefighter named Glenn Holleman. In response, in July 1996, before the Fund's Board of Trustees evaluated Williams's claim, the Board made changes to the criteria for receiving prior service credit.[2] These changes made Williams and many other firefighters ineligible for the benefit. Williams was granted a hearing on his claim in December 1996, but he was not allowed to contest the new guideline itself.

Williams brought suit against the Fund, Board members and the Board's attorneys, Strasburger & Price, alleging procedural due process and equal protection violations. In addition to this suit, Williams appealed the Board's decision to a Texas state district court under the statute's appeal provision. That court deferred its jurisdiction until 2003 or 2010, when Williams is eligible for retirement.[3] The defendants moved for summary judgment, and Williams moved for partial summary judgment arguing collateral estoppel based on the Holleman litigation. The district court granted summary judgment to the defendants. After failing on a motion to reconsider and two 60(b) motions, Williams timely appealed.

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[2]Those requirements were subsequently codified by the Texas legislature. *See* Tex. Rev. Civ. Stat. art. 6243e.2(1) § 16 (2000).

[3] *See Williams v. Houston Fireman's Relief & Retirement Fund*, 1999 WL 82441 (Tex. App.).

II

Williams argues that the denial of prior service credit violated his right to procedural due process and that the Board members were biased.[4] Williams does not complain of the due process afforded him at his December 1996 hearing, where his individual claim was considered; there, he had notice, counsel, an opportunity to present evidence, testify, and cross-examine witnesses, and a right to appeal to state court. Instead, he alleges that he was denied due process at the July hearing at which the Board promulgated the new guidelines.

Even assuming that Williams's former right to statutory benefits was a legitimate claim of entitlement whose judicial denial necessitated due process, the denial by the Fund's Board was not judicial but legislative. As such, the due process protections desired by Williams did not attach.[5] As a general matter, the fact that the Board interpreted the Texas statute does not make the creation of the guidelines judicial. Their legislative authority involved promulgating rules consistent with the meaning of the statute, a task which involved interpretive functions.[6]

In distinguishing the legislative from the judicial model, courts have examined whether the governmental

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[4] The defendants argue that none of Williams's claims are ripe. They confuse ripeness with exhaustion.

[5] *See Atkins v. Parker*, 105 S.Ct. 2520, 2528-29 (1985); *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986).

[6] *See* art. 6243e.2 § 2(j).

body was motivated by deciding the best course for the group in general, or adjudicating the rights of contending petitioners.[7] Also relevant is the breadth of discretion which the governmental body enjoys.[8] Under these two criteria, the Board's July actions were more legislative than judicial. The Board was exercising its statutory authority to promulgate guidelines - rules that subsequently were codified in the statute. And the guidelines, while made in the knowledge of the pending claims before the Board, had general future applicability beyond those claims. Williams's argument as to the bias of the Board's members also fails because the Board was acting legislatively.

III

Williams also contends that the Board's decision denied him equal protection under the law. He argues that the guidelines created two classes of firefighters: those coming from towns with a prior service credit like Houston's, and those coming from towns without.

As the categories are not a suspect class, the Board's actions need only reasonably relate to a legitimate state interest. A desire on the part of the Board to save money meets this standard. After the Holleman litigation, the Fund may have faced significant liability for which it had not planned if the City's and the firemen's contributions did not cover the amount of

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[7] *See Mahone v. Addicks Util. Dist. of Harris County*, 836 F.2d 921, 934-35 (5th Cir. 1988).

[8] *See Mahone*, 836 F.2d at 935.

accrued benefit. And if the City would have been unable to make the contributions, the health of the Fund might have been endangered.[9]

IV

Finally, the district court did not err in denying Williams relief under Federal Rule of Civil Procedure 60(b). The "new" evidence relied upon by Williams - an internal memorandum from a consultant to the Board, and the deposition testimony of two Board members taken in the state court case - does nothing to overcome the legal barriers to Williams's suit. In addition, nothing prevented Williams from taking these depositions while the federal suit was still pending. The new evidence did not warrant relief from the judgment.

AFFIRMED.

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[9] The Board also is not collaterally estopped from promulgating Guidelines not applied to Holleman: collateral estoppel does not apply to legislative acts.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II	§	
Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
	§	
HOUSTON FIREFIGHTERS'	§	
RELIEF AND RETIREMENT	§	
FUND, *et al.*,	§	
Defendants	§	
	§	

FINAL JUDGMENT [Entered July 24, 1998]

In accordance with the Memorandum Opinion issued this day, it is hereby

ORDERED that Plaintiff's Motions for Partial Summary Judgment (Docket Entries No. 19 and No. 35) and Motion for Leave to File Amended Complaint (Docket Entry No. 45) are **DENIED**; Defendants' Motion for Summary Judgment (Docket Entry No. 25) is **GRANTED**, and Plaintiff's cause of action is DISMISSED on the merits; and Defendants' Motion to Dismiss (Docket Entry No. 23), Motion for Stay of Discovery (Docket Entry No. 43), and Supplemental Motion for Stay

of Discovery (Docket Entry No. 44) are **DENIED AS MOOT**.

Taxable costs are assessed against Plaintiff.

THIS IS A FINAL JUDGMENT.

SIGNED this 23rd day of July, 1998, at Houston, Texas.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II	§	
Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
	§	
HOUSTON FIREFIGHTERS'	§	
RELIEF AND RETIREMENT	§	
FUND, *et al.*,	§	
Defendants	§	
	§	

MEMORANDUM OPINION [Entered July 24, 1998]

Plaintiff Elmer F. Williams II ("Williams"), a firefighter currently employed by the Houston Fire Department, filed this lawsuit alleging that Defendant Houston Firefighters' Relief and Retirement Fund (the "Fund"), the individual members of the Fund's Board of Trustees (the "Board"), and the attorneys representing the Fund and the Board (the "Attorney Defendants") violated his rights to due process and equal protection when they denied his application for prior service credit for years worked in other fire departments in Texas. The case is before the Court on Williams's Motions for Partial Summary Judgment (Docket Entries No. 19 and No. 35), the Board and Attorney Defendants' Motion to Dismiss (Docket Entry No. 23), all Defendants' Motion for Summary Judgment (Docket Entry No. 25), Motion for

Stay of Discovery (Docket Entry No. 43) and Supplemental Motion for Stay of Discovery (Docket Entry No. 44), and Williams's Motion for Leave to File Amended Complaint (Docket Entry No. 45). Based on the Court's consideration of the full record and governing legal authorities, Defendants' Motion for Summary Judgment is **GRANTED**.

I. FACTUAL BACKGROUND

Williams has been employed by the City of Houston Fire Department since April 1990. He is neither disabled, retired, nor currently eligible to retire. As a member of the Houston Fire Department, Williams is a participant in the Fund, a statutory firefighters' pension fund created under article 6243e.2 of the Texas Revised Civil Statutes.[1] The Fund is a defined benefit fund under which the pensioner receives a fixed pension, in the form of an annuity, based upon his average salary and length of service.

Transfer provisions of section 30 of article 6243e.2 provides that Fund members who meet certain criteria may receive "prior service credit" for years worked as a firefighter for another municipality in Texas. The Board construed section 30 to allow only eligible firefighters who have accrued service time in another municipality having an article 6243e-type fund to transfer that accrued

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[1]Effective November 1, 1997, article 6243e.2 was repealed and replaced by article 6243e.2(1) ("the 1997 Act"). Unless otherwise noted, references herein are to the prior statute which existed at the time the Board adopted the guidelines at issue and reached its decision regarding Williams's application for prior service credit.

service time to the Houston Fire Department's article 6243e.2 Fund (or to any other municipality having a 6243e-type fund).[2] The Board adopted a guideline consistent with their construction of section 30.

Prior to joining the Houston Fire Department, Williams worked for the Alamo Heights Fire Department for approximately four years and for the Hollywood Park Fire Department for more than two years. Williams applied for prior service credit for his years of service in these two fire departments. Neither of these departments has an article 6243e-type pension fund. Instead, each participates in the Texas Municipal Retirement System, which is a defined contribution plan in which the employees earn investment income on their contributions and on their employer's matching contributions. Williams withdrew his contributions to this retirement system, and those amounts are not affected by the Board's decision.

Following a hearing at which Williams, represented by counsel, presented evidence, the Board denied Williams's application. Williams filed an appeal in state court, which was dismissed without prejudice for lack of subject matter jurisdiction by order signed June 4, 1998. Williams also filed this federal lawsuit alleging

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[2]The Board's construction of section 30 was formally adopted by the Texas Legislature when it enacted section 16 of the 1997 Act. That section provides for "service credit for prior employment with the fully paid fire department of another municipality in this state **with a similar fund** . . ." if the transferring firefighter meets the other requirements for prior service credit. Tex. Rev. Civ. Stat. art. 6243e.2(1), section 16(a)(emphasis added).

violations of his constitutional rights of due process and equal protection by the Fund, the Board, and the attorneys who represented the Board. Williams and all Defendants have moved for summary judgment.

II. SUMMARY JUDGMENT STANDARD

The United States Supreme Court has held that a motion for summary judgment is properly granted unless there is evidence "on which the jury could reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict. . .." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Rule 56 is an integral part of the Federal Rules of Civil Procedure, recognizing a party's right to demonstrate that certain claims have no legal or factual basis and to have those unsupported claims disposed of prior to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

III. DUE PROCESS CLAIM

A. Property Interest

It has long been established that only those property rights which are vested are protected by the due process clause of the United States Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The plaintiff must have "more than an abstract need or desire for" and "more than a unilateral expectation of" the benefit at issue. *Id.* Instead, the plaintiff must "have a legitimate claim of entitlement to" the benefit. *Id.* Until a pensioner's right to benefits becomes due and owing, the

pensioner has no property right protected by the due process clause. *Pennie v. Reis*, 132 U.S. 464, 471 (1889).

"Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .." *Id.* Texas law has consistently provided that statutory pension benefits are not vested property rights. *Board of Managers v. Pension Board*, 449 S.W.2d 33 (Tex. 1969); *Woods v. Reilly*, 218 S.W.2d 437, 441 (Tex. 1949)(benefits under Teachers Retirement System not vested property right); *City of Dallas v. Trammell*, 101S.W.2d 1009, 1012-13 (Tex. 1937)(retirement benefits were not vested right and could be reduced after officer retired); *Reames v. Police Officers' Pension Board*, 928 S.W.2d 628, 632 (Tex. App. - Houston [14th Dist.] 1996, no writ)("a pensioner in a statutory pension plan does not have a vested right to his pension. He merely has an expectancy based upon anticipated continuance of existing law."); *Cook v. Employees Retirement System*, 514 S.W.2d 329 (Tex. Civ. App. - Texarkana 1974, writ ref'd n.r.e.). In *Creps v. Board of Firemen's Relief & Retirement Fund Trustees*, 456 S.W.2d 434, 437-39 (Tex. Civ. App. - Texarkana 1970, writ ref'd n.r.e.), the Texas Court of Appeals held that firefighters did not have a vested right in the pension fund until they had twenty years' service. It is undisputed that Williams does not yet have the required years of service, with or without the prior service credit, to be eligible to retire and receive a pension under the Fund. Consequently, Williams does not have a vested property interest in the statutory pension plan to which due process protections apply. Absent a vested

property interest, Defendants are entitled to summary judgment on Williams's due process claim.

B. Legislative/Regulatory Acts Not Subject to Due Process

Williams complains that the guidelines adopted by the Board were promulgated without giving Williams reasonable notice and an opportunity to be heard. The Court notes that the guidelines were adopted by the Board pursuant to its specific statutory authority granted by article 6243e.2 §§ 2(j)(2)-(3).[3]

Procedural due process requirements of notice and a hearing do not apply to legislative or regulatory enactments that apply to a general class of persons. *Atkins v. Parker*, 472 U.S. 115, 129 (1985); *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986). Under such circumstances, "all of those persons have received procedural due process by the legislative process itself and they have no right to individual attention. The challenges to such laws and regulations must be based on their substantive compatibility with constitutional guarantees." *LULAC*, 793 F.2d at 648. *See also Atkins*, 472 U.S. at 130.

Williams, as one of the general class of persons affected by the adoption of the guidelines interpreting section 30 of article 6243e, cannot prevail on his procedural due process challenge to the adoption of the

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[3]The Board's authority to adopt guidelines is now contained in section 2(p)(1) of the 1997 Act.

guidelines. Defendants are entitled to summary judgment on this claim.

C. Due Process Satisfied

The essence of procedural due process is notice and a meaningful opportunity to be heard. *McDonald v. City of Corinth*, 102 F.3d 152, 155 (5th Cir. 1996). Even were the Court to conclude that Williams had a vested property interest protected by the due process clause of the United States Constitution, Defendants would be entitled to summary judgment because it is undisputed that Williams received proper notice and a hearing prior to the denial of his application for prior service credit. The Board notified Williams by letter dated July 30, 1996, that he could participate in a hearing on the application. Williams and his attorney participated in the hearing, presented evidence which included Williams's testimony. Having received any process required by the Constitution, Williams's due process claim fails as a matter of law.

Williams alleges that his due process rights were violated because the Board is not an impartial decision maker. Williams presents no evidence that the Board was in any manner biased against him personally. Instead, Williams relies upon the Board's status as a fiduciary of the Fund. Williams argues that the Board is inherently biased against him because it is obligated to protect the Fund's assets, and his claim for prior service credit would increase the amount of his entitlement to those assets.

A person's due process rights may be violated by the participation of a decision maker who has a direct,

personal and financial interest in the outcome. *See, e.g., Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825-26 (1986); *Johnson v. Trueblood*, 629 F.2d 287, 292 (3rd Cir. 1980), *cert. denied*, 450 U.S. 999 (1981). There is no evidence in this case that the Board has such an interest. Indeed, pursuant to section 2(9) of article 6243e.2, the Board is prohibited from receiving any compensation for their service. The Fund's Code of Ethics bars any interested transactions or conflicts of interest which could interfere with the Board's fulfilling its fiduciary duty to the Fund. Moreover, the Board's obligation to protect the Fund's assets is for the benefit of all participants, including Williams. As a result, Williams has failed to raise a genuine issue of material fact on his allegation that the Board was not an impartial decision maker. Defendants are entitled to summary judgment on this claim.

EQUAL PROTECTION CLAIM

The equal protection clause, as applicable to this case, requires that the legislative classification rationally relate to a legitimate governmental objective. *Wottlin v. Fleming*, 136 F.3d 1032, 1037 (5th Cir. 1998). There is a presumption that the statute or regulation rests upon some rational basis. *United States v. Carolene Products Co.*, 304 U.S. 144, 151-52 (1938).

The classification at issue in this case distinguishes between persons transferring from a department with a 6243e-type pension plan and persons transferring from a department with a different plan. This classification is rationally related to the legitimate public purpose of fairly and prudently managing the Fund assets for the

benefit of the pensioners. The classification protects those who have earned or accrued service credit toward a defined benefit pension and, at the same time, protects the integrity of the Fund assets by not conferring a windfall on those who have neither earned nor accrued service credit toward the defined benefit they seek.[4] The preclusion of dual or "windfall" benefits is rationally related to a legitimate governmental interest. *See United States Railroad Retirement Board v. Fritz*, 449 U.S. 166, 177-79 (1980).

The classification also facilitates the relocation of firefighters participating in a 6243e-type retirement plan to other departments with similar plans, without depleting the Fund through payment of unearned benefits to relocating firefighters who have participated in different plans. Distinctions made between different classes of firefighters from different municipalities and participating in different pension plans does not violate the equal protection clause. *See Musquiz v. City of San Antonio*, 520 F.2d 993, 1002 (5th Cir. 1975), *vacated on other grounds*, 438 U.S. 901 (1978), *reaffirmed on remand as to constitutionality ruling*, 586 F.2d 529 (5th Cir. 1978).

Because a rational basis exists for the statute and the guidelines at issue, Williams's equal protection claim fails and Defendants' Motion for Summary Judgment is granted, the Board and Attorney Defendants' Motion to

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[4]As noted previously, Williams participated in a defined contribution plan while employed by the City of Alamo Heights and City of Hollywood Park. He has withdrawn the funds he earned while in those fire departments, but now seeks service credit in the City of Houston's defined benefit program for those same years.

Dismiss based on immunity is moot. *See Musquiz v. City of San Antonio*, 586 F.2d 529, 530 (5th Cir. 1978).

MOTION TO AMEND TO ADD COLLATERAL ESTOPPEL CLAIM

Williams has moved for leave to amend his complaint to add a collateral estoppel claim. Williams argues that Defendants are estopped to deny his claim for prior service credit by a prior decision in a subsequently settled Texas state court case, *Holleman v. Houston Firemen's Relief and Retirement Fund*, Cause No. 92-28684 in the 80th Judicial District Court of Harris County. To preclude litigation of an issue on the basis of collateral estoppel, the issue must have been litigated in the prior case. *Matter of Schwager*, 121 F.3d 177, 181 (5th Cir. 1997); *State Farm Fire & Casualty Co. v. Fullerton*, 118 F.3d 374, 377 (5th Cir. 1997); *Barr v. Resolution Trust Co.*, 837 S.W.2d 627, 629 (Tex. 1992).

The issue in *Holleman* was whether an applicant's request for prior service credit could be denied because the request was not made contemporaneously with the beginning of the firefighter's employment with the new department. That is not an issue in this case. More importantly, *Holleman* did not involve the validity of a denial of an application for prior service credit based on the prior employment having been with a department which does not have a 6243e-type retirement plan. Because the issue in this case was not litigated in *Holleman*, collateral estoppel does not apply and amendment to add a claim for collateral estoppel would be futile.

CONCLUSION AND ORDER

Williams does not have a vested property right in the application for "prior service credit" which would entitle him to the protections of due process. Any due process rights which Williams might have in the application procedure were fully satisfied. The classification of transfers from 6243e statutory pension plan departments as distinguished from transfers from other fire departments is reasonably related to a legitimate state interest and does not violate the equal protection clause of the United States Constitution. Collateral estoppel is not applicable in this case because the issue tried in the *Holleman* case, in which Williams was not a party, was different from the issue presented in this case.

Because Defendants' Motion for Summary Judgment is granted, Defendants' Motion to Dismiss and Motions for Stay of Discovery are moot. It is therefore,

ORDERED that Williams's Motions for Partial Summary Judgment (Docket Entries No. 19 and No. 35) and Motion for Leave to File Amended Complaint (Docket Entry No. 45) are **DENIED**; Defendants' Motion for Summary Judgment (Docket Entry No. 25) is **GRANTED**; Defendants' Motion to Dismiss (Docket Entry No. 23), Motion for Stay of Discovery (Docket Entry No. 43) and Supplemental Motion for Stay of Discovery (Docket Entry No. 44) are **DENIED AS MOOT**. A final judgment will be issued separately.

SIGNED this 23d day of July, 1998, at Houston, Texas.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II	§	
Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
	§	
HOUSTON FIREFIGHTERS'	§	
RELIEF AND RETIREMENT	§	
FUND, *et al.*,	§	
Defendants	§	
	§	

ORDER [Entered March 10, 1999]

Pending is Plaintiff's Second Rule 60 Motion for Relief from Judgment (Document No. 58). This motion was filed after Plaintiff filed his Notice of Appeal.

A notice of appeal normally divests the district court of jurisdiction over a case. *Winchester v. United States Attorney For the S. Dist. of Tex.*, 68 F.3d 947, 948 (5th Cir. 1995). There are exceptions, however, such as when a district court corrects clerical errors under Rule 60(a) and takes action in aid of the appeal. In *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1407 n.3 (5th Cir. 1994), the Fifth Circuit specifically recognized the "power of the district court to consider on the merits and deny a 60(b) motion filed after a notice of appeal," on the grounds that the district court's action is in furtherance of

the appeal. The court explained that it is only when the district court is inclined to grant a 60(b) motion that it is necessary to obtain the leave of the court of appeals. *Id.*

With these principles in mind, the Court has reviewed Plaintiff's Second Rule 60 Motion on the merits. Plaintiff claims that he should be relieved from the Court's Final Judgment because of (a) newly discovered evidence, and (b) Defendants' alleged misconduct. Specifically, Plaintiff states that Defendants did not produce a memorandum drafted by former Defendant Fund Executive Director Jennifer Morales (hereinafter the "Morales Memorandum") summarizing the status of pending service credit transfer applications and this litigation, and including certain advice by counsel. Plaintiff alleges that the Morales Memorandum, written six weeks before the Defendant Fund's Board of Trustees' interpretation of section 30, demonstrates that the Board's interpretation of the statute was made in anticipation of this litigation and was not meant for application to "a general class of persons." Accordingly, Plaintiff maintains that the Court improperly reviewed Plaintiff's equal protection claim under a legislative, as opposed to an adjudicative model. *See Mahone v. Addicks Utility Dist. of Harris County*, 836 F.2d 921, 934-35 (5th Cir. 1988)(summarizing differences between legislative and adjudicative models of review of a regulatory decision).

The Court has reviewed the Morales Memorandum and concludes it does not change the Court's equal protection analysis. The Board adopted the guideline at issue pursuant to specific statutory authority and in furtherance of its public responsibility to manage fairly and prudently the Fund assets for the benefit of the

pensioners. Secondly, the Morales Memorandum was specifically referred to in the June 13, 1996, minutes of the Personnel and Procedures Committee, which were made available to Plaintiff pursuant to his request under the Texas Open Records Act. (Document No. 59, Exhibit A). Plaintiff's charge that Defendants failed timely to produce the Morales Memorandum appears to be a valid complaint, and the Court expresses its disapprobation for that failure. If Defendants acted intentionally to conceal the document, then more severe sanctions are deserved even though the misconduct is not the kind of fraud that requires a new trial. As for the claim of newly discovered evidence, the Morales Memorandum is, as conceded by Plaintiff, "somewhat cumulative" of other evidence offered.

> To succeed on a motion brought under 60(b)(2) based on newly discovered evidence, the movant must demonstrate (1) that it exercised due diligence in obtaining the information and (2) "the evidence is material and controlling and clearly would have produced a different result if presented before the original judgment."

New Hampshire Ins. Co. v. Martech USA, Inc., 993 F.2d 1195, 1200, 1201 (5th Cir. 1993), quoting *Brown v. Petrolite Corp.*, 965 F.2d 38, 50 (5th Cir. 1992). The Morales Memorandum and the circumstances regarding its late production do not rise to this level. For these reasons, the Court concludes that Plaintiff is not entitled to relief under Rule 60 and that the July 24, 1998, Memorandum Opinion and Final Judgment should not be disturbed.

It is therefore

ORDERED that Plaintiff's Second Rule 60 Motion for Relief from the Judgment (Document No. 58) is DENIED.

The Clerk will enter this Order and send copies to all counsel of record.

SIGNED at Houston, Texas this 10th day of March, 1999.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND, *et al.*, Defendants	§	

ORDER [Entered Oct. 13, 1998]

This case is before the Court on Plaintiff Elmer F. Williams II's Motion to Reconsider, Alter or Amend Judgment (Docket Entry No. 50). Williams argues that the Court should change its decision denying Williams's Motion for Partial Summary Judgment and granting Defendants' Motion for Summary Judgment because (1) a Reply which Williams filed without leave of court may not have been considered; (2) Williams's summary judgment evidence was not objectionable; (3) he has new evidence to present, specifically a Plea in Intervention filed by the City of Houston in another lawsuit; and (4) he has a breach of fiduciary duty claim which has not been addressed. Although Williams asserts that the "new evidence" was not presented previously because it was not in his possession, he concedes that he had not

requested the pleading from Defendants. Additionally, as a pleading filed of record in the state court lawsuit, the Plea in Intervention would have been available through the state court record.

The Court has reviewed its prior decision, Williams's Reply filed July 22, 1998, and the currently pending motion. Based on this review, the Court concludes that Williams has failed to present a legal or factual argument which would support a different decision than the one set forth in the Court's July 24, 1998 Memorandum Opinion and Final Judgment. Accordingly, it is hereby

ORDERED that Plaintiff's Motion to Reconsider, Alter or Amend Judgment (Docket Entry No. 50) is **DENIED**. To the extent Williams may have asserted a breach of fiduciary duty claim in his original complaint, the Court declines to exercise its supplemental jurisdiction over that claim.

SIGNED this 12th day of October, 1998, at Houston, Texas.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II	§	
Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
	§	
HOUSTON FIREFIGHTERS'	§	
RELIEF AND RETIREMENT	§	
FUND, *et al.*,	§	
Defendants	§	
	§	

ORDER [Entered Dec. 15, 1998]

Pending is Plaintiff's Rule 60 Motion for Relief From The Judgment (Document No. 52).

The Court has carefully considered the motion and finds that it does not set forth a valid basis for relief from the Final Judgment and, accordingly, it is

ORDERED that Plaintiff's Rule 60 Motion for Relief From The Judgment is DENIED.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 15th day of December, 1998.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ELMER F. WILLIAMS II Plaintiff,	§	
	§	CIVIL
vs.	§	ACTION
	§	NO. H-98-0063
HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND, *et al.*, Defendants	§	

ORDER [Entered Jul. 27, 1999]

After having given careful consideration to Plaintiff's Third Rule 60 Motion for Relief From the Judgment (Document No. 65), and the other submissions made in support of and in opposition to such motion, it is

ORDERED that Plaintiff's Third Rule 60 Motion for Relief from the Judgment is DENIED.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 27th day of July, 1999.

/s/ "EWING WERLEIN, JR."
EWING WERLEIN, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-21080

ELMER F. WILLIAMS, II,

Plaintiff-Appellant,

v.

HOUSTON FIREFIGHTERS' RELIEF AND RETIREMENT FUND; DONNY R. MYERS; TOMMY R. SHELTON; GEORGE LOWDERMILK; MAXIE R. PATTERSON; D. GRADY PERDUE; JERRY A. BESSELMAN; PHILLIP J. WEDGEWORTH; ANDREA J. GERBER; WINSTON JOHNSON; J. WILEY GEORGE; STRASBURGER & PRICE, L.L.P.; JONATHAN B. CLAYTON,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Texas, Houston

[Filed August 17, 2000]

ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, JOLLY, AND HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

/s/ "Patrick E. Higginbotham"

UNITED STATES CIRCUIT JUDGE

APPENDIX D

1. Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Tex. Rev. Civ. Stat. Art. 6243e.2 § 30 (Vernon 1996) provides in relevant part:

(a) A fire fighter who transfers from the fire department of one city to that of a city covered by this Act and desires to participate in the fund of that city shall:

(1) be less than 35 years old;

(2) pass a physical examination taken at his expense and performed by a physician elected by the board; and

(3) pay into the fund of that city an amount equal to the total contribution he would

have made had he been employed by that city instead of the city from which he transferred, plus six percent interest.

(b) The city to which the fire fighter has transferred shall pay an amount equal to the amount it would have paid had the fire fighter been employed by that city instead of the city from which he transferred, plus six percent interest, compounded annually.

APPENDIX E

CONFIDENTIAL MEMORANDUM

To: Personnel & Procedures Committee

From: Jennifer C. Morales

Re: Applications for service credit from 88 members

Date: June 13, 1996

This memo will serve to re-cap for the Committee, where we stand with the "Section 30" application for service credit issue and to report my findings since the committee last met on the matter. Given the Committee's familiarity with the issues, I will not go over the entire history.

In September of 1995, attorney Troy Blakeney submitted applications from 88 members requesting pension service credit for work performed (in a variety of jobs and places) prior to joining the Houston Fire Department. Informally, Mr. Blakeney indicated that he believed his clients were entitled to service credit under Section 30 of Article 6243e.2. Upon receipt of the applications, we forwarded the matter to the Fund's counsel, Strasburger & Price, L.L.P.

Administratively, I discussed the matter with Wiley George and attorney Frank Sommerville, who represented the Fund in the Holleman matter. For a number of reasons, it would be counterproductive to engage Mr. Sommerville's firm on this matter in any

significant way. Prior to responding to Mr. Blakeney in writing, Mr. George suggested an informal meeting with the City to find out what our differences might be.

An informal meeting between our attorneys and the City's attorney took place. While the City expressed an interest in avoiding prolonged litigation, they indicated their willingness to fight if the costs were significant and hoped that the pension Board would consider their interests as things move forward.

The matter was referred by staff to the Personnel & Procedures Committee on December 7, 1995. The Committee considered the applications, which you will recall were organized and color-coded by staff. At Mr. George's request, we consulted with Alan Taper, to determine the total dollar effect of the request. The letter the Committee reviewed is attached again for your reference.

The Committee discussed criteria by which they could judge the applications. Mr. George believed that we had a stronger basis for rejecting the out-of-state, non-City, DROP, and "post-1990" applications. The Committee directed staff to meet with the City to explain that costs might not be as sizable as first expected, and to inquire about whether the City might be amenable to a "transfer" of this sort.

Pam Monroe and I then met with Carol Snyder at the Fund offices. Ms. Snyder's response was more favorable than the earlier meeting. She generally described what they City might be willing to do. I stopped by Troy Blakeney's office one day to inform him that we were still considering the applications. Chairman Myers was with me. Although the meeting was very informal, he agreed that many of the applications might lack merit. On the basis of these conversations, I worked with Alan Taper to determine the cost associated with the smaller group. I also requested alternative financing methods for those costs, thinking it might provide more opportunities for common ground.

Today, this item is on the agenda so I can report my findings to the Committee and to await your next instruction.

Let's recap where we are:

1) The Committee has good information on the nature of the applications.
2) The Committee has considered preliminary criteria for judging the applications.
3) The Committee has cost information relating to the full group of applications, as well the 34 applications that might meet the criteria discussed.
4) We have a general idea of what the applicants' counsel might consider to be a reasonable solution.

5) We have a general idea of what a reasonable solution might entail for the other party affected by these applications, the City.

At this point, the staff has moved about as far as we can go. We pursued this matter administratively and have got a good handle on what we are facing. Based on my conversations, I believe the possibility exists that we will be able to find some common ground with all affected parties, if the Board sees fit to do so. However, I also believe that actually negotiating the process will not be easy. The attorneys seem agreeable in theory, but their clients may not like the costs involved. Mr. Blakeney has a number of different clients to make happy. He and they may sue us regardless of an agreement with 34 members.

Most importantly, I believe that no matter where we go from here, individual trustees must insure that they confine all discussion of this matter to the Board room. The staff has done some preliminary work and we can help Strasburger & Price as we move ahead. This is a legal matter with the prospect for litigation and it must be handled properly.

Also, it is counsel's role to advise on these matters, I feel compelled to remind you that trustees cannot consider "who" is on the lists when making these decisions. Also, when making a decision, each trustee has to be sure that he or she is acting solely in the interests of all the members.

Mr. George has made himself available, if you have any questions for him today.

[Image of firefighter omitted]
Houston Firemen's Relief and Retirement Fund
Investing for Fire Fighters and Their Families

Board of Trustees
Donny R. Myers, Chairman; Tommy R. Shelton, Vice Chairman; George E. Lowdermilk, Secretary; Maxie L. Patterson, Treasurer; Jerry A. Besselman, Member; Phillip J. Wedgeworth, Member; Andrea J. Gerber, Citizen Member; Dr. D. Grady Perdue, Mayor's Representative

602 Sawyer, Suite 650, Houston, Texas 77007
713/862-7966
FAX 713/862-2615
http://www.hfrrf.org

July 30, 1996

Elmer F. Williams II
11309 Lone Shadow Trail
San Antonio, TX 78233

Dear Mr. Williams:

The Board of Trustees met regarding the issue of transfer of previous service credit under Section 30, Article 6243e.2 of Vernon's Annotated Civil Statutes. Your application contains limited information and may not provide enough evidence to support your claim that you meet the guidelines set forth by the Board for the transfer of service credit pursuant to Section 30, Article 6243e.2. These guidelines are as follows:

1. The paid fire department from which the fire fighter is transferring must be the paid fire department of a single municipality (city).

2. The city from which the fire fighter is transferring must be a city in the State of Texas.

3. The city from which the fire fighter is transferring must have its own Firemen's Relief and Retirement Fund to which the fire fighter contributed while he/she was a member.

4. The fire fighter must be transferring directly from the city, meaning there is no gap in employment between the two fire departments.

5. The fire fighter must not have executed a Fund document, that waives all rights to such prior service credit.

6. The fire fighter and the City of Houston must pay into the Houston Firemen's Relief and Retirement Fund amounts outlined in Subsection a(3) and b of Section 30, Article 6243e.2.

July 30, 1996
Page 2

If you have any additional evidence to show that you meet the above guidelines in full, you must provide such evidence to the following address no later than the close of business on August 30, 1996:

Houston Firemen's Relief and Retirement Fund
602 Sawyer, Suite 650
Houston, TX 77007
Attn: Raul Castillo

The Board of Trustees has appointed a special committee to consider your application for transfer of service credit. That committee will meet to formally review your application. You will be notified of the specific date. You and your attorney, if you have one, are invited to attend that meeting and have the opportunity to be heard about your application and the evidence you provided to support it.

If you have any questions regarding this letter, please call Raul Castillo, Director of Benefits Administration, at the pension fund office at 862-7966 or 1-800-666-9737. Contacting Board members individually could force them to abstain from voting on any applications for transfer of service credit.

Sincerely,

/s/ "Donny R. Myers"
Donny R. Myers
Chairman

[Image of firefighter omitted]
Houston Firemen's Relief and Retirement Fund
Investing for Fire Fighters and Their Families

Board of Trustees
Donny R. Myers, Chairman; Tommy R. Shelton, Vice Chairman; George E. Lowdermilk, Secretary; Maxie L. Patterson, Treasurer; Jerry A. Beselman, Member; Phillip J. Wedgeworth, Member; Andrea J. Gerber, Citizen Member; Dr. D. Grady Perdue, Mayor's Representative

602 Sawyer, Suite 650, Houston, Texas 77007
713/862-7966
FAX 713/862-2615
http://www.hfrrf.org

January 31, 1997

Elmer F. Williams II
11309 Lone Shadow Trail
San Antonio, TX 78233

Dear Mr. Williams:

On January 21, 1997, the Special Section 30 Committee of the Whole Board of Trustees met to make recommendations to the Board of Trustees of the Houston Firemen's Relief and Retirement Fund ("the Fund") concerning a number of applications for prior service credit under Section 30 of Article 6243e.2 of the Texas Revised Civil Statutes ("Section 30").

The Committee recommended that the Board reconsider the guideline concerning when an application for prior service credit must be filed, as set forth in my letter to you of October 3, 1996. The Committee then, based on the facts developed by you and your attorney and the other information in the record, applied the guidelines communicated to you in my letter of July 30, 1996 and recommended that your application for prior service credit be denied. The Committee passed the following recommendation concerning a number of applicants including you.

> *That the requests for prior service credit submitted by the following 19 applicants be denied because previous employment was with a fire department of a Texas city that does not have its own firemen's relief and retirement fund created under Article 6243e or its successors.*

On January 23, 1997, the Board of Trustees of the Fund met and voted to accept the recommendations of the Committee. The Board directed me to communicate its decision on your application to you, which is the purpose of this letter.

On behalf of the Board of Trustees of the Fund, I want to extend our appreciation for the patience and cooperation you have demonstrated during the course of these long and difficult deliberations.

Sincerely,

/s/ "Donny R. Myers"

Donny R. Myers
Chairman

Copy: Mr. Frederick T. Dietrich, P.L.L.C.
Attorney at Law
2211 Norfolk, Suite 620
Houston, Texas 77098

APPENDIX F

ELMER F. WILLIAMS, II, Appellant v. HOUSTON FIREMEN'S RELIEF AND RETIREMENT FUND,[1] Appellee

NO. 01-98-00681-CV

COURT OF APPEALS OF TEXAS, FIRST DISTRICT, HOUSTON

1999 Tex. App. LEXIS 893

February 11, 1999, Opinion Issued

NOTICE:

PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

PRIOR HISTORY: On Appeal from the 281st District Court. Harris County, Texas. Trial Court Cause No. 97-09970.

This Opinion Substituted on Denial of Rehearing for Withdrawn Opinion of January 21, 1999, Previously Reported at: 1999 Tex. App. LEXIS 332.

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[1]The Fund is now known as the Houston Firefighter's Relief and Retirement Fund.

JUDGES: Murry B. Cohen, Justice. Panel consists of Justices Cohen, Hedges, and Taft.

OPINIONBY: MURRY B. COHEN

OPINION:
OPINION ON REHEARING

We deny Williams' rehearing motion, but we withdraw our opinion dated January 21, 1999 and substitute this opinion in its place.

Williams takes this interlocutory appeal from the granting of the partial motion to dismiss for lack of jurisdiction over appellee, the Fund. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 51.014(8) (Vernon Supp. 1999). We affirm.

I. Background

We construe Williams's pleadings in his favor and take those allegations as true. *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993).

Williams joined the Houston Fire Department (HFD) and the Fund in 1990, after six years and five months of service with two other cities' fire departments, neither of which had statutory firefighters' retirement funds like Houston's. In 1995, Williams sought credit for these six and one half previous years service toward his retirement with HFD. While his request was pending, the Fund adopted a new interpretation of the retirement

credit transfer statute,[2] i.e., that years worked outside

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[2]The former retirement credit transfer provision provided in pertinent part as follows:

> A firefighter who transfers from the fire department of one city to that of a city covered by this Act and desires to participate in the fund of that city shall . . . [meet three requirements]." Former TEX. REV. CIV. STAT. ANN. art. 6243e.2, § 30(a) (repealed effective Nov. 1, 1997).

The current retirement credit transfer provision provides as follows:

> A person who becomes a firefighter in a municipality to which this article applies may receive service credit for prior employment with the fully paid fire department of another municipality in this state with a similar fund benefitting only firefighters of that municipality to which the firefighter contributed if . . . [the firefighter meets five requirements]." TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 16(a) (Vernon Supp. 1999) (effective Nov. 1, 1997) (emphasis added).

The Fund construed the first sentence of former section 30(a) to mean what the italicized portion of current section 16(a) now expressly says. The correctness of the Fund's interpretation of former section 30 is not before us. Nor is the applicability of former section 30, in light of recent

(continued...)

Houston could be credited to the Fund only if the former city also had a statutory firefighter's fund. Applying the new statutory interpretation, the Fund denied Williams's retirement credit request in January 1997.

That same year, Williams sued in district court, asserting the following claims:

Constitutional claims

> 1. TEX. REV. CIV. STAT. ANN. article 6243e.2(1) is an unconstitutional delegation of governmental authority;
>
> 2. The Fund's rulemaking and decision are unlawful and unconstitutional retroactive applications of the law;
>
> 3. The Fund's rulemaking is an unconstitutional local law; and
>
> 4. The Fund's construction and application of the statute denied equal protection under the state and federal constitutions, which denial also constituted a 42 U.S.C. section 1983 violation.

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[2](...continued)

amendments. Because the parties assume that former section 30 applies, and because the sections differ materially, we will refer to former section 30 in this opinion, without deciding its application. Otherwise, for simplicity's sake, we will refer to other provisions of the current version of the statute (article 6243e.2(1)) throughout this opinion.

Claims Relating to Statutory Authority

1. The Fund misconstrued former TEX. REV. CIV. STAT. ANN. article 6243e.2, section 30; and

2. The Fund adopted and applied rules inconsistent with and in violation of that former statute.

Challenges on the Merits

1. No or insufficient evidence supported the Fund's decision;

2. The Fund's decision was not supported by substantial evidence;

3. The Fund's decision was unreasonable, arbitrary, capricious, or an abuse of discretion; and

4. The Fund's ruling was barred by res judicata, claim preclusion, issue preclusion, waiver, estoppel, and collateral estoppel.

The Fund moved to dismiss certain of Williams's claims for lack of subject matter jurisdiction. The trial judge dismissed all Williams's claims without prejudice except (1) his four constitutional claims and (2) his claim that the Fund's ruling was barred by res judicata, claim preclusion, issue preclusion, waiver, estoppel, and collateral estoppel.

In two issues, Williams contends the trial judge erred in dismissing his claims because (a) the trial court

had appellate jurisdiction to review the Fund's ruling and (b) the trial court had original jurisdiction to construe article 6243e.2(1) and to determine if the Fund acted outside its statutory powers.

7. Appellate Jurisdiction

Under issue two, Williams argues the trial court had appellate jurisdiction because the following provide for review of the Fund's decision without further delay: (1) article 6243e.2(1); (2) the Federal Constitution's equal protection clause; and (3) the Texas Constitution's article V, section 8. Williams's "appellate jurisdiction" challenge applies to all his dismissed claims.

A. Article 6243e.2(1)

When, as here, a cause of action and remedy for its enforcement are derived from statute, the statutory provisions for review are mandatory and exclusive. *E.g., Texas Catastrophe Prop. Ins. Ass'n v. Council of Co-Owners of Saida II Towers Condominium Ass'n*, 706 S.W.2d 644, 645-46 (Tex. 1986). An aggrieved party must comply with the statutory provisions in all respects, or the trial court has no jurisdiction over his action. *Id.* Therefore, no right of judicial review from a State administrative agency's action exists unless a statute provides for review or the action violates constitutional due process. *Firemen's & Policemen's Civil Serv. Comm'n of Fort Worth v. Blanchard*, 582 S.W.2d 778, 778-79 (Tex. 1979).

Article 6243e.2(1) provides as follows:

> Each decision of the [Fund's] board in a matter under the board's jurisdiction is final and binding as to each affected firefighter, member, and beneficiary, subject only to the rights of appeal specified by this article.

TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 2(j) (Vernon Supp. 1999) (emphasis added). Section 12,[3] the sole section mentioning judicial appeal, provides as follows:

> (a) A member who is eligible for retirement for length of service or disability or who has a claim for temporary disability, or any of the member's beneficiaries, who is aggrieved by a decision or order of the [Fund's] board, whether on the basis of rejection of a claim or of the amount allowed, may appeal from the decision or order of the board to a district court in the county in which the board is located by giving written notice of the intention to appeal . . . .

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[3]The parties rely on former TEX. REV. CIV. STAT. ANN. article 6243e.2, section 17, which was repealed effective November 1, 1997 . The current provision governing such appeals is TEX. REV. CIV. STAT. ANN. article 6243e.2(1), section 12 (Vernon Supp. 1999). The current provision has no applicable savings clause and, thus, now applies to this suit. *See Firemen's Pension Comm'n v. Jones*, 939 S.W.2d 730, 733 (Tex. App.--Austin 1997, no writ); *Crawford v. City of Houston*, 600 S.W.2d 891, 893 (Tex. App.--Houston [1st Dist.] 1980, writ ref'd n.r.e.). We note, however, that the former and current provisions do not differ in any way affecting the parties.

TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 12(a) (Vernon Supp. 1999) (emphasis supplied).

Williams reads section 2(j) to allow an appeal of any board decision, presumably because the decision is "final," concluding section 12(a) merely specifies appellate procedures for two non-exclusive classes of appellants (those eligible for retirement or with temporary disability). Williams also argues that section 12(c)--which allows the court to consider evidence not in the administrative record--implies a right of immediate appeal, because evidence could be lost in the years between the denial of a firefighter's service credit request and his retirement. *See* TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 12(c) (Vernon Supp. 1999). The Fund reads section 12(a) as the only provision providing for appellate review. Accordingly, the Fund argues Williams may not challenge its credit decision until at least 2003, the earliest possible date he would be "eligible for retirement," as described in section 12(a).[4]

While section 2(j) makes the board's decisions final, it expressly makes those decisions "subject only to the rights of appeal specified by this article." TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 2(j). Section 2(j) does not expressly authorize appeals. Additionally, not every final administrative decision is appealable. *See, e.g., Harris v. Civil Serv. Comm'n for Mun. Employees of the City of Houston*, 803 S.W.2d 729, 730 (Tex. App.--Houston [14th

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[4]If Williams's interpretation of former section 30 is correct, he will be eligible to retire in 2003. See TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 4(a) (Vernon Supp. 1999). If the Fund's interpretation is correct, Williams will not be eligible to retire until 2010. *See id.*

Dist.] 1990, no writ); *Pruitt v. City of Houston*, 548 S.W.2d 90, 93 (Tex. Civ. App.--Houston [1st Dist.] 1977, no writ). We agree with the Fund that the only section allowing a right of appeal is section 12(a), which limits appeals to (1) aggrieved "members" [5] who (2) are "eligible for retirement" for length of service or disability or (3) who have a claim for temporary disability and (4) any of these members' beneficiaries. TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 12(a). If a statute is silent concerning appeal from an administrative body's action, then no appeal lies, but courts will recognize an inherent right to appeal if the administrative action violates a constitutional provision or fits other limited exceptions not applicable here. *E.g., Firemen's & Policemen's Civil Serv. Comm'n of Fort Worth v. Kennedy*, 514 S.W.2d 237, 240 (Tex. 1974); *City of Amarillo v. Hancock*, 150 Tex. 231, 239 S.W.2d 788, 790 (Tex. 1951). Williams's constitutional challenges are not before us, and article 6243e.2(1) on its face does not allow for judicial review of the fund's credit determination until Williams meets section 12(a)'s requirements. Moreover, we find no implied right of appeal in section 12(c). The fact that evidence might be lost does not change the text of the statutes.

Accordingly, we overrule this challenge to the dismissal order.

B. Equal Protection Clause

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[5] A "member" is a firefighter or former firefighter who has satisfied the eligibility requirements under article 6243e.2(1) section 13 and who has not yet received a distribution of the entire benefit to which he is entitled. TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 1(13) (Vernon Supp. 1999).

Williams argues that the dismissal order violates the Fourteenth Amendment's equal protection clause, because only an immediate right of appeal treats all firefighters equally. We conclude that this argument falls under Williams's equal protection claim below: "The Fund's construction and application of the statute denied Mr. Williams equal protection of the law under the Texas Constitution and the United States Constitution." This claim was not dismissed and is not before us.

C. Texas Constitution Article V, § 8

Williams next argues that 1985 amendments to Texas Constitution article V, section 8 allow for immediate review of the Fund's service credit determination.

Before 1985, article V, section 8 read in pertinent part as follows:

> The district court shall have . . . general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this constitution, and such other jurisdiction, original and appellate, as may be provided by law.

TEX. CONST. art. V, § 8 (amended 1891, 1973). In 1985, the article was amended to read in pertinent part as follows:

> District Court jurisdiction consists of exclusive, appellate, and original

> jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. . . .

TEX. CONST. art. V, § 8.

Williams relies on *Farmers Texas County Mutual Insurance Company v. Griffin*, in which the Supreme Court stated the 1985 amendment significantly broadened district court jurisdiction. 955 S.W.2d 81, 84 (Tex. 1997). However, *Griffin* is distinguishable, because it was not an appeal of administrative agency action, which requires statutory authorization.

When no statute allows for review of an administrative action, amended article V, section 8 allows review only if the action violates a constitutional right, an issue that is still before the trial court; adversely affects a vested property right, an issue not presented in this appeal; exceeds the agency's jurisdiction, which we discuss below; or fits a like exception, which Williams does not allege. *Yamaha Motor Corp., U.S.A. v. Motor Vehicle Div., Texas Dept. of Transp.*, 860 S.W.2d 223, 230 (Tex. App.--Austin 1993, writ denied) (action exceeding agency's jurisdiction); *Texas Water Comm'n v. Lindsey*, 850 S.W.2d 183, 188 (Tex. App.--Beaumont 1992, no writ) (constitutionality of statute); *Sells v. Roose*, 769 S.W.2d 641, 643 (Tex. App.--Austin 1989, no writ) (vested property right affected). Accordingly, we overrule this challenge to the dismissal order.

We overrule Williams's issue two in its entirety.

I. Original Jurisdiction

Under issue one, Williams argues the trial court had original jurisdiction to (1) consider whether the Fund exceeded its statutory authority and (2) construe article 6243e.2(1). Williams's "original jurisdiction" challenges apply only to his claims that the Fund "misconstrued" and "adopted rules inconsistent with and in violation of" former section 30.

A. Exceeding Statutory Authority

Courts generally do not interfere in an administrative agency's duties and functions, but will intervene and give declaratory relief when the agency exercises authority beyond its statutorily conferred powers. *Nuchia v. Woodruff*, 956 S.W.2d 612, 616 (Tex. App.--Houston [14th Dist.] 1997, pet. denied); *see City of Sherman v. Public Utility Comm'n of Texas*, 643 S.W.2d 681, 683 (Tex. 1983). Williams alleged the Fund "misconstrued" and "adopted rules inconsistent with and in violation of" former TEX. REV. CIV. STAT. ANN. article 6243e.2, section 30.

Williams complains that the Fund improperly construed former section 30 to mean that, in order to receive retirement credit, the cities from which he transferred had to have statutory firemen's retirement funds. Article 6243e.2(1) clearly gives the Fund the power to interpret and construe the article and determine members' legal eligibility for participation, service, and benefits. TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), §

2(p)(1), (2), (5) (Vernon Supp. 1999). In this interlocutory appeal, Williams does not challenge the fact that the Fund has this statutory authority or the statute's validity (the latter remains before the trial judge). Rather, we interpret Williams's complaint to be that the Fund wrongly construed the statute, which is not a complaint that the Fund acted outside its statutory authority.[6] *Texas Comm'n of Licensing & Regulation v. Model Search Am., Inc.*, 953 S.W.2d 289, 292 (Tex. App.--Austin 1997, no writ);[7] *North Alamo Water Supply Corp. v. Texas Dept. of Health*, 839 S.W.2d 455, 459 (Tex. App.--Austin 1992, writ denied); *see Texas Educ. Agency v. Cypress-Fairbanks Ind. Sch. Dist.*, 830 S.W.2d 88, 90-91 (Tex. 1992).

Williams relies on *City of Sherman v. Public Utility Commission of Texas*[8] and *Nuchia v. Woodruff*,[9] which we find distinguishable. In the case before us, the statute

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[6]Williams's petition alleged that "the Fund misconstrued . . . [and] . . . adopted and applied rules inconsistent with and in violation of [the article]," and the crux of his arguments here and below was that the Fund misconstrued the article.

[7]"The foregoing impediments to declaratory relief are not avoided by a claim that the opinion given by the Commission's general counsel and director of enforcement is ultra vires. They had the undoubted authority to interpret the Act's provisions and to make a decision in that regard. That they 'might decide 'wrongly' . . . does not vitiate' their authority to make a decision." 953 S.W.2d at 292 (quoting *North Alamo Water Supply Corp. v. Texas Dept. of Health*, 839 S.W.2d 455, 459 (Tex. App.--Austin 1992, writ denied)).

[8]643 S.W.2d 681, 684-85 (Tex. 1983).

[9]956 S.W.2d 612, 616 (Tex. App.--Houston [14th Dist.] 1997, pet. denied).

expressly allows the Fund to interpret and construe the article and determine members' legal eligibility for participation, service, and benefits. TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 2(p)(1), (2), (5). This was not the situation in *City of Sherman* and *Woodruff*. The City of Sherman court held the statute did not give the PUC jurisdiction to regulate operations of municipally-owned utilities, contrary to the PUC commissioner's determination, and the Woodruff parties disputed whether the statute gave a hearing examiner jurisdiction to take the action he had taken. *Woodruff*, 956 S.W.2d at 616; *City of Sherman*, 643 S.W.2d at 684-85.

Accordingly, we overrule this challenge to the dismissal order.

B. Construction of Article 6243.2(1)

Williams first contends that the Texas Trust Act section 115.001 grants the trial court original and exclusive jurisdiction to construe article 6243e.2, section 30. TEX. PROP. CODE ANN. § 115.001(a) (Vernon 1995). We decline to decide that issue because Williams did not make that argument in the district court. He did not mention the Texas Trust Act until his fifth amended petition, which was filed in the trial court only five days before oral argument in our Court. This issue was not raised here until oral argument. Consequently, there is no trial court ruling for us to review.

Williams next argues the construction of former TEX. REV. CIV. STAT. ANN. article 6243e.2, section 30 is a pure question of law over which the trial court has original jurisdiction.

It is undisputed that the fire departments in which Williams had previously worked were in cities without statutory firemen's retirement funds. The sole reason the Fund denied Williams's service credit request is that his prior years of service were in such cities, contrary to the Fund's interpretation of former section 30. We, therefore, agree with Williams that the interpretation of former section 30 is a purely legal issue. *See Public Util. Bd. of City of Brownsville v. Central Power & Light Co.*, 587 S.W.2d 782, 788 (Tex. Civ. App.--Corpus Christi 1979, writ ref'd n.r.e.) (holding construction of statute is inherently judicial determination).

Williams first relies on the line of cases holding that a court may review purely legal questions without the plaintiff's exhausting administrative remedies unless a statute authorizes the agency to decide the question.[10] However, this case is not about exhausting administrative remedies, because all agree that Williams did so. Moreover, article 6243e.2(1) empowers the Fund to construe the article and determine members' eligibility for participation, service, and benefits. TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 2(p)(1), (2), (5).

Williams next relies on the line of cases holding that if a court stays an action pending an agency's resolution of part of the case ("primary jurisdiction"

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[10] *See International Union of United Auto. Aerospace & Agric. Implement Workers of Am. Local 119 v. Johnson Controls, Inc.*, 813 S.W.2d 558, 566 (Tex. App.--Dallas 1991, writ denied); *see also Grounds v. Tolar Indep. Sch. Dist.*, 707 S.W.2d 889, 892 (Tex. 1986); *Blount v. Metropolitan Life Ins. Co.*, 677 S.W.2d 565, 569 n.1 (Tex. App.--Austin 1984), *rev'd on other grounds*, 709 S.W.2d 646 (Tex. 1986).

doctrine), the court may still consider inherently judicial questions unless a statute grants the agency exclusive jurisdiction.[11] However, this case is not about primary jurisdiction; the Fund has concluded its determination.

Article 6243e.2(1) does not expressly state the Fund has exclusive jurisdiction to construe the statute. We have already held the statute does not provide for appeal of the Fund's service credit determinations until the member is eligible for retirement or temporary disability. See TEX. REV. CIV. STAT. ANN. art. 6243e.2(1), § 12(a). The question becomes the following: if we hold the district court has original jurisdiction to construe former section 30 now--simply because article 6243e.2(1) does not expressly state the Fund has "exclusive" power to interpret the article--are we in fact allowing an appeal disallowed at this time by section 12(a) of the same article?

We believe the answer is "yes." Article 6243e.2(1) contemplates a member's appellate challenge after he becomes eligible for retirement or disability. Were we to recognize an inherent right of review of statutory interpretation before then, section 12(a)'s appeal rule would mean nothing. The exhaustion-of-administrative-remedies cases Williams cites are not dispositive, because the enabling statutes considered in them allowed for present appeal once administrative remedies were exhausted. *See Grounds*, 707 S.W.2d at 892; *Birdville Indep.*

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[11] *Gregg v. Delhi-Taylor Oil Corp.*, 162 Tex. 26, 344 S.W.2d 411, 415 (Tex. 1961); *see also Harris County Mun. Utility Dist. No. 48 v. Mitchell*, 915 S.W.2d 859, 864-65 (Tex. App.--Houston [1st Dist.] 1995, writ denied).

Sch. Dist. v. First Baptist Church of Haltom City, 788 S.W.2d 26, 28-29 (Tex. App.--Fort Worth 1988, writ denied); *see also Johnson Controls*, 813 S.W.2d at 566.[12] Here, in contrast, we have held article 6243e.2(1) does not allow a present right of appeal.

A claimant may exhaust all administrative remedies and still have no present right of judicial review. Williams has none under the statute.

We overrule this challenge to the dismissal order.

We overrule Williams's issue one in its entirety.

I. Conclusion

We affirm the trial judge's order granting the Fund's jurisdictional plea.

Murry B. Cohen
Justice
Panel consists of Justices Cohen, Hedges, and Taft.

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[12]In *Johnson Controls*, the class representative alleged his employer had violated the Texas Workers' Compensation Act (WCA) by requiring him to see a particular physician. *Id.* at 562, 564. He sought an injunction to prevent WCA violations. The employer argued that the plaintiff had to exhaust administrative remedies with the Industrial Accident Board (IAB) before filing suit. *Id.* at 565-66. The Johnson Controls court disagreed, holding that the court had original jurisdiction to consider the purely legal question of whether the WCA gave the plaintiff the rights he contended were violated. *Id.* at 566. The IAB had no authority to enjoin the employer, and no adjudicatory responsibility over employers. *Id.* Here, in contrast, the Fund has legislative authority to do what it did.